

## 3. PARTIES AND JOINDER

### A. PARTIES

Courts are to avoid multiplicity of proceedings and ensure all disputes are finally determined (s29(2) *Supreme Court Act*).

CPA's overarching purpose is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute (s7).

- Who do you sue and who can sue?

### Preliminary requirements

#### Capacity

- P must have capacity to sue, and D must have capacity to be sued
  - **Minors or handicapped parties** must sue/defend by **litigation guardian** (r15.01-03 *SCR*) who must not have an interest in the proceeding and who must engage a solicitor
  - **Partnerships** must sue/be sued in name of firm (r17.01)
    - You can sue one partner, knowing all others are liable
    - Or name all
    - Or name the firm, knowing this actually functions as naming all partners
  - **Companies** must act via a solicitor and must advise of name changes (r1.17)
    - Be wary of related companies and complex company structures: it may be that one company owes DOC but another breaches it, in which case, you can't sue
      - It must be the same company
    - Company being wound up: need court's leave and must sue under court's terms (s500(2) *Corporations Act*)
  - **Unincorporated bodies** cannot be sued (eg Cath.Church in *Savcor*)
    - Sue the named members
      - Be careful: the members at point of COA arising may not be the same at point of initiating litigation
    - The Ellis defence - preventing survivors of abuse from suing unincorporated institutions incl church - has been abolished by legislation
  - **Bankrupt parties** are immune from suits re debt (s58(3)(b) *Bankruptcy Act*) but not from suits re personal injury

#### Pre-trial discovery to identify D

- In regular civil proceedings you need to know who the individual or company is that you're suing
  - Exception: Traffic Accident Commission will stand in for unidentified D (eg. if someone runs into your car but you don't know who)
- Pre-trial discovery to identify D may be ordered where (r32.03):
  - Applicant has made reasonable inquiries and is unable to identify D
  - Appears that a person has relevant docs/knowledge to assist identification

- Court may order that person make discovery or attend court for oral examination
- Requested order is a “pre-issuing proceedings order” but is a kind of interlocutory order, made by Applicant (who will become P))
  - Should be made in the court in which litigation is anticipated to take place
    - Most VSC interlocutory applications are made in the Supreme Court Practice Courts
  - The form will be accompanied by an affidavit (from Sols) stating what the client has provided, eg:
    - Medical bills of loss
    - Evidence of an outing in which the event occurred
    - Corro with friends
    - Evidence of reasonable enquiries
- Cannot be used to identify location or gather evidence (*Dallas Buyers Club*):
  - Sought order under r32.03, seeking to send people a bill for film based on identified IP addresses where film was shared online via BitTorrent
  - The order requires you to seek a name so you can bring an action, not so you can send a bill
    - Court may have allowed the order if they had said they were going to sue everyone named for the value of the bill!
  - A company like iiNet would NOT hand over details without such an order
    - Only with such an order would there be no recourse for the owners of those addresses to sue iiNet for handing over the details

### Standing

- P must have standing to sue, establish by:
  - Private right (eg. privity of contract, tort)
  - Legislation (ie. meets legislative test)
  - Public interest
    - more than a “mere intellectual or emotional concern” and must be more than interest of an “ordinary member of the public” (*ACF v Cth*);
      - Additional factors are relevant: group is representative of significant public concern; interest in the area is established

### Interveners and *amicus curiae*

As X is interested in the matter but not a party to a case, they may involve themselves as an *intervener/amicus curiae*.

- Including an intervener or *amicus curiae* often turns an action into a ‘test case’ such that broader issues are heard than just the party-specific concerns being resolved, and as such, parties often do not want them involved
  - eg Right to Life intervening to give information on person’s with a particular disability
  - eg environmental lobbying groups involved in disputes of use of land

### Interveners

- Someone whose interests will be affected but who are not entitled in ordinary circumstances to be a party
  - No direct involvement in the transactions of the matter
- Must seek leave to be made a party (r9.06)
  - May have orders made in relation to them, including costs orders
  - All burdens will apply to them
- Statute granting intervening rights:
  - A-G has special status to intervene on anything
  - ACC can intervene on ACL matters
  - HREOC can intervene on matters under the Act is administers

### Amicus curiae

- Involving *amicus curiae* is at Court's discretion
- 'Friend of the Court'
  - Someone seeking involvement, but not to be made party
  - May be heard when court believes it will be (Levy):
    - Significantly assisted in a unique way; AND
    - Without disproportionate cost and delay
- Eg Castan Centre involved as *amicus curiae* in case to determine whether anti-abortion protest laws limit free speech
- *Amicus curiae* often assist a case to move along more quickly with higher quality information
- **CBA v Doggett:**
  - Ds claimed CBA lent them money without making sure they could afford the repayments—which breaches a voluntary Code of Conduct the big banks signed up to
  - Argued that terms of vol CoC should be included in mortgage agreement
  - Unrepresented Ds unable to provide court with assistance as to legal issues
  - Judge asked for *amicus curiae* to come and give arguments (again) better than parties involved had done
    - Nb this goes against the principle that he who asserts must prove
    - Request made because the issues were novel and of potential general significance to the banking industry
    - The Bank did not oppose the involvement of *amicus curiae*

## Joinder of parties

- Joinder occurs before commencing proceedings (r9.02 permissive, 9.03 necessary)

### Compulsory joinder

- P must join all persons **jointly entitled** to the relief claimed (r9.03(1))
- P should claim against all persons **jointly liable** (r9.03(3))
  - However, if D is **jointly and severally liable**, the other need not be joined (r9.03(2))

### Permissive joinder

- 2 or more persons can be joined as Ps or Ds in any proceeding where (r9.02):
  - Common question of law or fact would arise (a)(i) (interpreted liberally – see eg *Birtles v Cth*, below); AND

- Rights to relief arise out of the same transaction/series of transactions (a)(ii) (*Payne v Young*); OR
- The court gives leave to do so (b)
  - Broad discretion, but joinder must not lead to unfairness (*Bishop*, below)
  - If one of the limbs in (a) is established, P is likely to succeed under (b) (*A&J Partitions*)
  - Case management principles relevant (*Lee per Dixon J*), including (*Lord Woolf*)
    - “Achieving early settlement; Encouraging spirit of cooperation; Progressing cases to trial speedily and cheaply; Diversion of cases to ADR; Identification and reduction of issues in dispute
  - Having regard to the efficient conduct of proceedings (s9 CPA)

**Common questions of law or fact (*Birtles v Cth*)**

- ‘Same transaction/series of transactions’ is a remedial rule and to be interpreted broadly
- In this case, the two actions to be joined were:
  - Suing SEC/Cth for damages for personal injury arising from industrial accident
  - Suing Sol for negligence for not bringing his claim in time
- One claim is ‘touched a wire at work’ and the other is ‘failed to file claim in time’
  - On the surface, not common questions of fact
- But if left separate, P is ‘perched between two stools’ - if one D pulls away, he falls between them
  - In order to succeed against Sol, he needed to prove he would have succeeded in his original claim
  - In the original claim, his argument would be dismissed on the basis that it was not brought in time, so it wouldn’t succeed (the causal chain was broken)
  - Heard separately, each D’s argument relies on the separation of the actions in order to escape liability
- Same transaction: he went to the lawyer as a result of being injured at work
  - He would not have gone otherwise, so it is the ‘same transaction/series of’
- Options:
  - Heard jointly - come along and defence yourself properly together
  - Heard separately, but case against Sol stayed until other case heard - on the condition that findings of fact in first case are not disputed

**Not the same transaction/series of (*Payne v Young*)**

- 7 abattoirs owners asked to pay inspection fee after inspection by
- Sought declaration that fee was an excise and void as imposed by State not Cth legislation here (excise excl to Cth jurisdiction)
- Separate proceedings would raise common questions of law/fact
- BUT not arising out of the same transaction
  - No common participation by all Ps in inspection services
  - Each inspection was peculiar to each individual Plaintiff
  - ‘Similar’ but not ‘same’
    - Same from perspective of D? But not from perspective of P

**Broad discretion, but no unfairness (*Bishop v Bridgelands Securities*)**

- Respondents sent out letter to entice Applicants to invest in Co which failed—money unsecured and therefore lost